# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 3, 2005 |
| v | No. 250770<br>Grand Traverse Circuit Court |
| BRIAN PAUL FERNSEMER,<br><br>Defendant-Appellant. | LC No. 03-009119-FH |

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of criminal sexual conduct in the fourth degree, MCL 750.520e(1)(b). Defendant was sentenced to ninety days in jail and to thirty-six months' probation. We affirm.

## I. Facts

The charges in this case arose out of an incident between defendant and Joni Randell on January 30, 2003. Both defendant and Randell testified that they had been romantically involved, but this involvement ended sometime in early 2002. Both also agreed that despite the end to their romantic relationship, defendant and Randell went on a previously arranged trip together in March of 2002, which involved a consensual sex act. Both parties also agreed that Randell worked for defendant from approximately June of 2002 through the end of the year. However, the parties differed substantially over the nature of the continued personal and business relationship and over the events that occurred on January 30, 2003.

Randell testified that defendant engaged in inappropriate sexual behaviors and contact throughout the period after she ended the romantic relationship. She stated that on January 30, 2003, she was at home preparing for a trip when defendant stopped by her home. Randell said defendant came up and asked her to show him how to do Yoga, but she declined. She stated that defendant then went to leave, but asked her for a hug goodbye. She said that when she hugged him, he was shaking and she became scared. Randell testified that at this point defendant turned to her and said, "I forgot, I want to give you a – I have to give you a spanking." She said he then came right at her, pulled her shorts and underwear down, and began to rub her bottom. Randell testified that she told him to stop and to leave, but that his eyes were glazed and he was shaking. She said she pulled her clothes back on and he began to leave, but he again turned toward her, pushed her down onto the bed, and flipped her over aggressively. She said she again told him to

stop and he replied, "I just want to kiss your belly." She said he then pulled her shorts down and said, "I have to smell you." Randell testified that he put his nose near her vagina and took a deep breath, after which, he got up and left without a word.

Defendant testified that it was Randell who broke the personal boundaries that she set. Defendant said that after he hired Randell, she always wore provocative clothing and came on to him at work and that she initiated several incidents of sexual contact. Defendant stated that he maintained the personal boundaries, but she would manipulate him by touching him, kissing him, and through other means. Defendant claimed that the sexual relationship continued throughout 2002, but that he ended all sexual relations in January of 2003. Defendant testified that, on January 30, 2003, as he had previously arranged with Randell, he stopped by her home to drop off some information. Defendant said Randall was dressed only in her underwear and that she asked him to massage her. Defendant said he massaged her as requested and then started to leave when Randell began to hug and kiss him. Defendant testified that while they were hugging and kissing, they fell onto her bed and he kissed her belly. Defendant said he then started to pull down her panties, but she said, "no." Defendant said at this point he got up and left. Defendant denied rubbing her bottom and stated that all of the other contact was consensual.

## II. Prior Acts Evidence

Defendant first argues that the trial court erred by permitting plaintiff to present testimony regarding defendant's prior acts through two witnesses. We disagree.

This issue was properly preserved by defendant's motion in limine to prevent the admission of prior acts evidence. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). However, whether a rule or statute precludes admission of evidence is a matter of law and reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2004). Moreover, even when properly preserved, error in the admission of bad acts evidence does not require reversal unless it "'affirmatively appear[s] that it is more probable than not that the error was outcome determinative.'" *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), quoting *Lukity*, *supra* at 496.

Before trial, plaintiff indicated its intention to call Leah Riley[1] and Cindra Moore as witnesses to testify concerning incidents they each had with defendant. Riley told police that she had had a relationship with defendant and that one-day defendant called her and said he wanted to drop off a birthday card and give her a spanking. She said she informed him that she did not want to be spanked. Despite her refusal, defendant came to her house, pulled her onto his lap, pulled down her pants and underwear, and spanked her bare bottom. Riley also stated that, a few

[1] Leah Riley changed her name to Cynjeffar Leah Dzwiet around the time of the trial, but is referred to throughout the transcript as Leah Riley. For ease of reference, we shall refer to her as Riley.

minutes later, while trying to defuse the situation by making defendant a cup of tea, defendant again came up behind her, told her he wanted to see her panties, and started pulling down her pants.

Moore also told police that she had had a relationship with defendant. She stated that defendant had come to her home unannounced and, without warning, forced her into her bedroom and onto her bed. She also said defendant got on top of her and started rolling around, getting aroused. She stated that she asked defendant to stop, but that he continued to move around on top of her and started to pull down the zipper of his pants. Moore indicated that she only succeeded in stopping defendant after punching him repeatedly in the side of the head and yelling over and over again that he did not have her consent.

Plaintiff argued that this testimony regarding defendant's prior acts was admissible to show defendant's common scheme, plan or system. Defendant objected on the ground that the testimony was offered for an impermissible character inference and, even if it were not, it was irrelevant and prejudicial. At a hearing on the prior acts testimony, the trial court stated that, "as the evidence has been proposed by the People, it can and should be received." However, the court later stated that it felt the evidence was "relevant towards lack of accident and – and evidence of intent. And it would be appropriate impeachment with regard to witnesses who say, 'Well, this gentleman is not sexually aggressive.'" Furthermore, the court expressed its opinion that any prejudice could be cured by a jury instruction. At trial, both women's testimony was substantially the same as their statements to the police.

Under MRE 404(b), other acts evidence may not be offered "solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). However, it may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(1). To be admissible under MRE 404(b), prior acts evidence must satisfy three requirements: (1) it must be offered for a purpose other than showing character or propensity, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

In this case, plaintiff offered the prior acts testimony to show defendant's common scheme, plan or system. At the hearing on the admissibility of this testimony, the trial court appeared to accept plaintiff's position that the prior acts testimony was admissible on that ground,[2] but later indicated that it "was looking at it more as relevant towards lack of accident and – evidence of intent." Plaintiff agreed and stated that, once he realized that defendant was going to argue consent, he had independently decided to argue that the testimony was admissible on this ground as well. The trial court also stated that the prior acts testimony would be admissible to impeach testimony that defendant was not sexually aggressive. Hence, the prior acts testimony was offered for a purpose other than to show defendant's criminal propensity.

[2] We see no evidence in the record to support defendant's assertion that the trial court explicitly rejected this as a permissible purpose for the admission of the prior acts testimony.

The prior acts testimony was also highly relevant. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich,* 246 Mich App 101, 114; 631 NW2d 67 (2001).

Both prior acts witnesses testified that they had been in relationships with defendant and that at some point he engaged in inappropriate nonconsensual sexual contact. Riley testified that defendant came over to her home and, despite her protests, placed her over his knee, removed her clothing and spanked her. Riley also testified that, after she attempted to defuse the situation, defendant decided to again assault her by removing her clothing. Moore, like Riley, testified that defendant came over to her home unannounced and proceeded to force her into the bedroom where he began to roll around on her and get aroused. Riley stated that defendant did this despite being repeatedly told that he did not have her consent. Both accounts were relevant as evidence of defendant's intent to engage in sexual contact with Randell regardless of her consent. Both accounts also refute defendant's assertion that he respects the wishes of women and does not engage in nonconsensual sexual contact.

Defendant argues that he did not intend to argue consent, but rather that his only defense was that "he never spanked Ms. Randell, he never pulled down her pants and rubbed her buttocks, and he never placed his nose in her groin." Consequently, defendant argues, the admission of the prior acts testimony was irrelevant to show lack of consent. We disagree.

In his proposed jury instructions, defendant included a jury instruction on consent. See CJI2d 20.27. Likewise, at trial defendant testified that he was not the one who broke the boundaries Randell set, but rather that she initiated the sexual contacts at work and on the day in question. He further testified that, although he was keeping the boundaries set by Randell, she would manipulate him by touching, kissing "and that type of thing." The inference being that Randell initiated the sexual contacts. Finally, defendant admitted that, during the January 30, 2003 incident, he was on the bed with Randell and that he smelled her belly and attempted to remove her panties. He testified that it was only then that she asked him to stop. He further explained that he stopped at her request because he respects women. From this testimony it is clear that defendant was arguing that he had her actual consent and that the very moment that she indicated that he did not have her consent, he stopped out of respect for her wishes. The fact that defendant denied that he engaged in one particular act, the spanking, does not remove the issue of consent as a legitimate issue at trial.[3] In addition, a reasonable jury could determine from the

[3] Defendant's contention that consent was not at issue if he did not specifically raise it is also without merit. First, defendant's request for a jury instruction on consent, CJI2d 20.27, actually placed consent at issue. Furthermore, the statute requires plaintiff to prove beyond a reasonable doubt that "force or coercion is used to accomplish the sexual contact." MCL 750.520e(1)(b). While not required to address the issue of consent until defendant presents sufficient evidence of consent, see *People v Thompson*, 117 Mich App 522, 528; 324 NW2d 22 (1982), because consent precludes conviction of criminal sexual conduct by force or coercion, *People v Jansson*, 116 Mich App 674, 682; 323 NW2d 508 (1982), plaintiff could properly present evidence that tended to show that the act was not consensual.

prior acts testimony that defendant did not have Randell's consent when he embraced her and they "fell" onto her bed. They could further infer that defendant did not have her consent when he smelled her belly. If the jury disbelieved defendant's assertion that these contacts were with Randell's consent, then the jury could also determine that defendant was not being truthful when he denied pulling down Randell's shorts and underwear and rubbing her bare buttocks. Consequently, the lack of consent throughout the encounter was both relevant and probative of defendant's actual conduct.

Finally, the probative value of the prior acts testimony was not substantially outweighed by its potential for unfair prejudice. Unfair prejudice does not mean damaging. Any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The prior acts evidence was highly probative of defendant's intent to make sexual contact with Randell, regardless of her consent, and served to impeach the evidence presented by defendant suggesting that he would not engage in nonconsensual sexual contact. Furthermore, the trial court took great pains to instruct the jury regarding the proper use of the prior acts testimony, stating,

> You have heard evidence that was introduced to show that the Defendant committed improper acts for which he is not on trial. If you believe this evidence, be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that in this case the Defendant acted purposefully, that is, not by accident or mistake or because he misjudged the situation. You must not consider the evidence for any other purpose. For example, you must not decide that it shows Defendant is a bad person or is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime or you must find him not guilty.

Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the prior acts testimony was highly probative and any prejudice was mitigated by the trial court's instructions on its proper use, there was no error in the admission of the prior acts testimony.

Defendant next contends that the trial court erred by permitting plaintiff to split his proofs by calling an additional prior acts witness on rebuttal. We disagree. Because defendant never objected to the calling of the witness or to any of her testimony, this issue is unpreserved and we will review it for plain error affecting substantial rights. See generally *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

Before the trial, defendant indicated his intent to call character witnesses to offer testimony that he was not a sexually aggressive person. After this statement to the court, plaintiff indicated that it had another witness, Barbara Nelson, who could testify about an incident where defendant acted sexually aggressive towards her. The court responded "that's potentially rebuttal evidence. We'll see what the Defense actually offers in that vein and what

your offer of proof is at the close of the Defense case, but that very well could be potentially rebuttal evidence."

On direct examination, defendant's trial attorney questioned defendant about an encounter with Nelson at a party. Defendant testified that he made an innocent comment regarding Nelson's leather pants and that she responded by saying "I have panties to match, too, do you want to see?," and unbuttoning her top. Defendant testified that he immediately left the room they were in and rejoined the party. Plaintiff later called Nelson as a rebuttal witness and had her recount her version of the incident. Nelson testified that defendant made a remark about her pants and then said "Let's see what you have on underneath those pants," and attempted to undo them.

Although defendant framed his question as one involving the splitting of proofs, he actually argues that the trial court erred by permitting Nelson to testify about defendant's character using a prior act in contravention of MRE 405. However, we decline to address defendant's argument. It is well established in Michigan that a prosecutor may question witnesses about a matter raised on direct examination. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). As such, when his trial counsel elected to question him on direct examination regarding the incident with Nelson, he opened the door to plaintiff's presentation of Nelson's version of the incident on rebuttal. See *People v Paquette*, 214 Mich App 336, 342 (1995); *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Consequently, there was no plain error let alone plain error affecting defendant's substantial rights.

Finally, defendant contends that the trial court erred by permitting plaintiff to impeach his witnesses with extrinsic evidence on collateral matter. In his brief, defendant argues that, if the evidence of the prior acts witnesses was "improperly admitted under MRE 404(b), MRE 608 is not available as a fallback, proper alternate and/or independent ground for admission of their testimony." Because we have already determined that their testimony was properly admitted, we need not address defendant's assertion regarding MRE 608.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski